



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

NOV 10 2016

Mr. William Quincy Thompson
Vice Chief Penobscot Nation
Air Quality Program Manager
12 Wabanaki Way
Indian Island, Old Town, ME 04468

RE: Determination Regarding Request for a 18 U.S.C. § 208(b)(1) Waiver

I am writing in response to your request for an individual waiver pursuant to 18 U.S.C. § 208(b)(1) so that you can be detailed from your position with the Penobscot Nation to the Environmental Protection Agency (EPA) under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.* The Office of Indoor Air, which is part of the Office of Radiation and Indoor Air in EPA's Office of Air and Radiation, and the Penobscot Nation mutually intend to enter into a one-year IPA so that you can assist EPA in improving indoor air quality and promoting healthy homes on tribal lands. Your anticipated work under the IPA may affect your employer, the Penobscot Nation, as well as other Indian Tribes and Nations, so a waiver is necessary.

After careful consideration of the facts, I am granting you a waiver of the requirements of 18 U.S.C. § 208(b)(1) for the IPA detail. As required, my staff consulted with the Office of Government Ethics, which did not object to the issuance of the waiver. Your appointing officials in the Office of Indoor Air and the Office of Radiation and Indoor Air, also agree to this waiver.

Federal laws regarding conflicts of interest are critical to ensuring public confidence in the integrity of Agency decision making and are not swayed by personal interests. A waiver of your imputed financial interest pursuant to § 208(b)(1) should only be granted when the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. Set forth below is my application of federal law to the specific facts of your request.

The Penobscot Nation

The entity with which you have a conflict of interest under 18 U.S.C. § 208(b)(1) is your employer of record, the Penobscot Nation, which is one of the 562 federally recognized Indian Tribes in the United States. EPA is responsible for maintaining and enforcing national standards under a variety of environmental laws, in consultation with tribal, state, and local governments. In carrying out its mission, EPA delegates some permitting, monitoring, and enforcement responsibility to the federally recognized tribes and states. Thus, the Penobscot Nation is

directly regulated by EPA but also serves as a co-regulator in carrying out our environmental mandate.

Your Roles As They Relate to the Penobscot Nation and the EPA

Your position of record is Air Quality Program Manager of the Penobscot Nation, a unit of the Department of Natural Resources. In this position, you oversee ambient air monitoring, indoor air quality guidance and outreach to Penobscot Citizens, and participate on several workgroups and committees addressing air quality issues. Your anticipated role with EPA will be to enhance collaboration and coordination among national Federal programs that implement tribal grant, loan, technical assistance and other support programs to positively impact indoor air quality and healthy homes on tribal lands. You will identify best practices of Federal grant, loan and technical assistance programs, assistance application reviewers and tribal applicants, and disseminate those across Federal programs, including at the Regional level. In addition, you will increase the capacity of Tribes to effectively apply for Federal indoor air quality support and to carry out or access effective and proper indoor air quality interventions. During your detail, you will not retain any responsibilities associated with your position of record in the Nation.

The Legal Standard

During the entirety of your IPA detail, EPA will reimburse the Penobscot Nation for 100% of your salary and benefits (currently \$ ^{FDA (b)(6)} annually), and supplement that amount to bring your total annual salary to the GS-13, step 1 pay rate – currently \$ ^{FDA (b)(6)} for Washington DC, but you will not be counted against the EPA employee ceiling. Individuals detailed to EPA under an IPA are considered to be employees of their home institution “for all purposes except work and supervision,” see EPA’s IPA Policy and Procedures Manual, p. 1-3, but are also subject to the federal ethics statutes, including 18 U.S.C. § 208, which governs financial conflicts of interest. That said, you are also deemed an “employee” for the purposes of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the federal conflict of interest statutes codified at Title 18 of the United States Code. See 5 C.F.R. § 2635.102(h) [defining “employee” as including “employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, et seq.”]. You are therefore prohibited from participating personally and substantially in an official capacity in particular matters in which you have a personal financial interest or in which you have an imputed interest under 18 U.S.C. § 208. The statute is intended to prevent employees from allowing personal or imputed financial interests to affect their official actions and to protect government processes from any actual or apparent conflict of interest. The fact that you have been detailed from the Penobscot Nation does not render this prohibition inapplicable.

Pursuant to 18 U.S.C. § 208(a), executive branch employees are prohibited from participating personally and substantially in a particular matter that will have a direct and predictable effect on their financial interests or those interests that are imputed to them.

Specifically, the statute states:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, ... participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

For the purposes of this provision, the financial interests of the Penobscot Nation are imputed to you because you are their employee of record, and your continued employment and participation in the Penobscot Nation's defined benefit plan are personal financial interests.¹ Absent a waiver from the imputed interest, you are prohibited from participating in any particular matter that affects the Penobscot Nation's financial interests.

18 U.S.C. § 208 provides for the possibility of obtaining a waiver of the requirements of the provision:

- (1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee

You seek a waiver under this provision.

Your Request for a Waiver

If granted, this waiver will permit you to perform the responsibilities EPA and the Penobscot Nation will authorize you to perform under the terms of the IPA extension itself.

Application of Applicable Law to Your Request for a Waiver and Decision

¹ I note that you participate in the Penobscot Nation's retirement system, which is a defined benefit plan that provides full pension benefits at your retirement date. Because the sponsor is an Indian Nation, this personal financial interest does not qualify under the exemption about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor under the federal conflict of interest statute. See 5 C.F.R. § 2640.201(c)(1)(ii), 2640.201(c)(1)(iii) and 2640.201(c)(2).

As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you, the employee. Before I render a decision I must first, pursuant to 5 C.F.R. § 2640.303, consult with the Office of Government Ethics, where practicable, which my staff has done.

In this situation, I conclude that your employment status with the Penobscot Nation does present an imputed financial conflict of interest of the sort prohibited by 18 U.S.C. § 208, absent a waiver or applicable regulatory exemption. The statute's prohibitions are not absolute, however, and specifically authorize an agency official to waive those prohibitions in certain limited circumstances. At EPA, I am the Designated Agency Ethics Official and, as such, have the authority to grant such a waiver.

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you for the one year of the IPA detail, and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208 during that time period.

Legal Analysis

In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You and the Penobscot Nation are the "persons" whose financial interests are involved;
- You will be on an IPA assignment from the Penobscot Nation although EPA will reimburse the Nation for your salary and benefits;
- The disqualifying imputed financial interest arises from your employment status with the Penobscot Nation, which raises the potential for gain or loss for the Nation as a result of government action that you may participate in as part of your EPA duties;
- You have a personal financial interest arising from continued participation in their defined benefit plan²;
- Your position as the Penobscot Nation's Air Quality Program Manager involves your personal and substantial participation in particular matters that involve the Penobscot Nation specifically, including decisions or recommendations about grants and other specific party matters;

² However, your continued participation in the Penobscot Nation defined benefit plan is not a disqualifying interest. You will not be participating in any particular matter that will have a direct predictable effect on the plan sponsor's ability or willingness to pay the pension. Although you have a "covered relationship" with the plan sponsor pursuant to 5 C.F.R. § 2635.502(b)(iii), I determine that you may nonetheless participate in a particular matter that involves the plan sponsor as a specific party.

- The Penobscot Nation is directly regulated by EPA but also serves as a co-regulator in carrying out EPA's environmental mandate; and
- Both EPA and the Penobscot Nation will specifically assign you to work on indoor air quality issues that may include that Nation.

I have considered these factors carefully, as well as the fact that you will not be participating personally and substantially in any particular matters at the EPA that would have a direct and predictable effect on your employment or employment benefits with the Nation, because none will come before you. Under the statute, then, the only remaining question is whether the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." In considering this aspect of the statutory test, the fact that you are on an IPA detail is particularly relevant.

By signing the IPA agreement, EPA and the Nation will be assigning you to work on indoor air quality-related issues that include the Nation. The "integrity of the services" that the Nation and EPA expect from you in your EPA position will be to fulfill your duties to the best of your ability to benefit both organizations. Frankly, when approving your IPA, the Nation will be recognizing that your EPA scope of work may entail working directly on particular matters that involved it but they are not expected to place any parameters on your ability to represent EPA's interests over theirs. There will be no limit on the performance of those duties even if those duties were not fully aligned with the interests of the Nation on a particular matter.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities, including tribes. To refuse to consider a waiver at all, or to dramatically limit one, would seem to defeat that intention. I therefore conclude that your imputed financial interest in the Nation is not likely to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

Conclusion

Based on the factual circumstances of this request, including the expectations of the Penobscot Nation and EPA that you are performing work to benefit both organizations, and the limited nature of the request, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1).

This waiver is limited in nature and permits only your official participation in particular matters that arise in the Office of Indoor Air that you would be participating in as part of your assigned duties as Policy Advisor (Tribal Housing and IAQ). You may work on particular matters that involve the Nation, even as specific party matters, because I have determined that doing so is not likely to affect your employment with the Nation or the ability or willingness of the Nation to meet its commitments under its defined benefit plan. This waiver will cease to be effective upon the end of your IPA detail.

You understand that you remain a federal employee while on the IPA assignment, subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and

the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to promptly seek assistance from Justina Fugh, Senior Counsel for Ethics, or me.

Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.

Sincerely,



Kevin S. Minoli
Principal Deputy General Counsel and
Designated Agency Ethics Official

cc: Jonathan Edwards, Acting Director, Office of Radiation and Indoor Air
David Rowson, Director, Indoor Environments Division
Justina Fugh, Senior Counsel for Ethics